

1  
2  
3 **UNITED STATES DISTRICT COURT**  
4 **DISTRICT OF NEVADA**

5 \* \* \*

6 JUSTIN L. TRIPP,

7 Plaintiff,

8 v.

9 CLARK COUNTY, et al.,

10 Defendants.  
11

Case No. 2:17-cv-1964-JCM-BNW

**ORDER**

12 Presently before the Court are eleven motions (ECF Nos. 44, 53, 58, 67, 69, 70, 75, 76,  
13 82, 91, 94), which the Court will address following a short recitation of the background of this  
14 case.

15 **I. Background**

16 Plaintiff is a pro se prisoner in the custody of the Federal Bureau of Prisons. This case  
17 arises from Plaintiff's allegations that: in March of 2016, he was arrested by Officers Torres and  
18 Rose. While being arrested, the officers beat him with their fists and metal batons. Plaintiff lost  
19 consciousness twice and suffered several injuries, including a facial contusion, dozens of  
20 superficial injuries, a dislocated shoulder, and broken arm. After the beating ended, officers  
21 handcuffed Plaintiff behind his back, which caused extreme pain. He was then taken to a hospital  
22 to treat his injuries where, among other things, he was given a sling for his broken arm. After this,  
23 he was taken to the Clark County Detention Center (CCDC) and handcuffed to a bench for  
24 approximately 24 hours. During this time, he could not stand up, lie down, use the restroom, get  
25 water, or feed himself and was in extreme pain. A few days later, Officer Esparza at CCDC took  
26 his sling away from him even though hospital staff told Plaintiff he was to wear it for several  
27 weeks.  
28

1 As a result of these alleged events, Plaintiff filed a complaint against numerous defendants  
2 and an *in forma pauperis* application. Before screening Plaintiff's complaint, the Court sent  
3 Plaintiff forms and instructions for filing a Section 1983 complaint and gave him 30 days to file  
4 an amended complaint. (EC No. 8.) Plaintiff filed an amended complaint on January 7, 2019.  
5 (ECF No. 14.) The Court reviewed the First Amended Complaint and determined that it stated  
6 five plausible claims: (1) Fourth Amendment excessive force against defendants Torres and Rose;  
7 (2) Fourteenth Amendment inadequate medical care against defendants Rose, Torres, and John  
8 Doe #1; (3) Fourteenth Amendment conditions of confinement against defendant John Doe #1;  
9 (4) Fourteenth Amendment inadequate medical care against defendants NaphCare, Inc., Dr.  
10 Duran, Eric Lopez, nurse Rachel, and John Does #2, 3, 4, 5, and 6; and (5) Fourteenth  
11 Amendment inadequate medical care against defendant Esparza. (ECF No. 18 (Screening Order).)  
12 The Court also dismissed defendants Clark County, Las Vegas Metropolitan Police Department  
13 (LVMPD), Andrea Beckman, and Dr. Johnson without prejudice. (*Id.*)

14 **II. Plaintiff's Motions to Amend First Amended Complaint and to Strike**  
15 **Defendants' Response to This Motion (ECF Nos. 44 and 58)**

16 **A. The Parties' Arguments**

17 Plaintiff filed a motion to amend on March 18, 2019. (ECF No. 44.) Defendants  
18 responded on April 1, 2019. (ECF No. 47.) Plaintiff replied on April 15, 2019 and moved the  
19 Court to strike Defendants' response. (ECF Nos. 58, 59). To this motion to strike, Defendants  
20 responded (ECF No. 66) but Plaintiff did not reply.

21 In Plaintiff's proposed Second Amended Complaint, he attempts to add additional factual  
22 allegations to make out *Monell* claims. That is, he attempts to make out claims that LVMPD,  
23 CCDC,<sup>1</sup> and Clark County have customs or policies of "keeping detainees in severe pain,"  
24

---

25 <sup>1</sup> As this Court previously noted, under Nevada law and federal case law, CCDC is not a separate  
26 legal entity distinct from Clark County and cannot be sued. "CCDC is a department of Clark County and  
27 not an independent legal entity. NRS 41.0305. Therefore, it cannot be sued. *Wayment v. Holmes*, 912 P.2d  
28 816, 819–20 (Nev. 1996); *Wright v. City of Las Vegas, Nev.*, 395 F. Supp. 2d 789, 794 (S.D. Iowa 2005)  
("In Nevada, political subdivisions may be sued; departments of political subdivisions may not." (citing  
NRS 41.031(1), (2))." (ECF No. 30 at 2.)

1 handcuffing inmates to a bench for extended periods, and disallowing inmates to have any  
2 medical devices while in the general population of the jail.

3 Defendants oppose Plaintiff's motion to amend, arguing that amendment would be futile.  
4 This is so, according to Defendants, because Plaintiff fails to allege any facts supporting his  
5 theory that LVMPD, CCDC, or Clark County have these alleged customs or policies. Defendants  
6 argue that Plaintiff's assertions are conclusory and only based on his personal experiences "from  
7 an isolated incident."

8 In Plaintiff's reply, he first moves the Court to strike Defendants' response "because the  
9 Defendant that is [responding] against the *Monell* claims isn't a party to them."<sup>2</sup> Plaintiff  
10 continues by arguing that "this defendant has no interest in this *Monell* claim . . . ." It appears to  
11 the Court that Plaintiff may be attempting to make a standing argument. However, the Court  
12 denies Plaintiff's motion to strike Defendants' response (ECF No. 58) because he provides no  
13 authority to support this argument. LR 7-2 ("The failure of a moving party to file points and  
14 authorities in support of the motion constitutes a consent to the denial of the motion."). In the  
15 future, Plaintiff is advised that he must support his arguments with relevant legal authority (for  
16 example, statutes or case law).

17 Plaintiff continues in his reply by addressing Defendants' argument that he has not offered  
18 enough factual allegations in his proposed Second Amended Complaint to state *Monell* claims.  
19 He starts, by way of background, explaining why his new allegations were not included in his  
20 original complaint. He describes, in detail, the legal forms that inmates are given to fill out when  
21 they are pursuing a claim, including the limited number of lines and pages inmates are allowed to  
22 use for each section and what each section tells the inmate to write. Plaintiff writes that he  
23 "believes that the forms and instructions are designed to streamline lawsuits and to prevent overly  
24 writing claims . . . ." However, he argues that the forms are vague and fail to give some inmates  
25 enough space to make out their claims. He argues further that some of the instructions,

---

26  
27 <sup>2</sup> Plaintiff appears to be confused about which defendants are presently in the case and which were  
28 previously dismissed. (*See* ECF No. 59 at 1.) On January 16, 2019, Clark County and LVMPD (among  
others) were dismissed from this case without prejudice. (*See* ECF No. 18.)

1 specifically those that tell the inmates “not to cite legal authority or to cite case law” in certain  
2 sections can set up a “trap” for legally unsophisticated inmates. He notes that this happened to  
3 him, stating that he only referenced “LVMPD sett[ling] a[nother] suit for this exact same civil  
4 rights violation” without further detail in his proposed Second Amended Complaint because “the  
5 instructions [on the form] said not to cite legal authority or to cite case law.” He also states that he  
6 did not originally plead *Monell* claims because he did not have access to a law library at the time.

7 Plaintiff then addresses the substance of Defendants’ claim that he has not plead enough  
8 facts in his proposed Second Amended Complaint to assert *Monell* claims. In response to  
9 Defendants’ assertion that Plaintiff “does not identify the policy” at issue, Plaintiff argues,  
10 “Plaintiff need not identify the precise policy or custom at issue, which would be difficult for an  
11 inmate to do without detailed records of LVMPD policies, customs or practice[s] . . . .” In  
12 response to Defendants’ assertion that Plaintiff’s allegations are only based on “his personal  
13 experience from an isolated incident[,]” Plaintiff disagrees.

14 Regarding his allegation in Count II that “LVMPD must have a policy then for keeping  
15 detainees in severe pain,” Plaintiff alleges that several officers were all “a party” to handcuffing  
16 him behind his back while his shoulder was dislocated.

17 Regarding his allegation in Count III that “CCDC/Clark County/LVMPD has a custom,  
18 policy and a known history” of handcuffing inmates to a specific bench for extended periods,  
19 Plaintiff alleges that while he was handcuffed to the bench, at least four other people were all  
20 handcuffed to the same bench. He also cites *Cooley v. Marshal*, a case in which an inmate at  
21 CCDC sued (and won) over being handcuffed to a bench for an extended period. 2015 WL  
22 4622589, at \*3 (D. Nev. July 31, 2015), *aff’d in part, rev’d in part and remanded sub*  
23 *nom. Cooley v. Meads*, 728 F. App’x 773 (9th Cir. 2018) (reversed only on district court’s refusal  
24 to give punitive damages instruction to jury). Plaintiff notes that in *Cooley*, Judge Du specifically  
25 noted that “the court is concerned about the constitutionality of the Detention Center’s practice of  
26 restraining detainees to a bench as a solution to the shortage of isolation cells,” but did not  
27 address the constitutionality of this policy as plaintiff “ha[d] not asserted a claim under *Monell*.”  
28

1 *Id.* at \*3 n. 3. Plaintiff writes that he wants a *Monell* claim for this practice to be before the Court  
2 now.

3 Turning to Plaintiff's claim that LVMPD, CCDC, and Clark County have a policy of  
4 disallowing inmates to have any medical devices in the general population, Plaintiff argues that  
5 this claim is not based on solely on his own experience. He writes that it is also based on two  
6 other facts: (1) in his twenty months at CCDC, he never saw another inmate with a medical  
7 device and (2) Officer Cesar Esparza told him that CCDC does not allow medical devices outside  
8 of the medical unit.

### 9 **B. Legal Standard**

10 Generally, a party may amend its pleading once "as a matter of course" within twenty-one  
11 days of serving it, or within twenty-one days after service of a responsive pleading or motion  
12 under Rule 12(b), (e), or (f). Fed. R. Civ. P. 15(a)(1). Otherwise, "a party may amend its pleading  
13 only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2).  
14 "The court should freely give leave when justice so requires." *Id.* "The court considers five  
15 factors [under Rule 15] in assessing the propriety of leave to amend—bad faith, undue delay,  
16 prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously  
17 amended the complaint." *United States v. Corinthian Colls.*, 655 F.3d 984, 995 (9th Cir. 2011).

18 Here, Defendants challenge Plaintiff's motion to amend on futility grounds only, arguing  
19 that Plaintiff's *Monell* claims are futile. A proposed amendment is futile if it could not withstand  
20 a Rule 12(b)(6) motion for failure to state a claim. *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209,  
21 214 (9th Cir. 1988). In order to establish a *Monell* claim (i.e. liability for governmental entities  
22 under 42 U.S.C. § 1983), a plaintiff must prove "(1) that [the plaintiff] possessed a constitutional  
23 right of which [s]he was deprived; (2) that the municipality had a policy; (3) that this policy  
24 amounts to deliberate indifference to the plaintiff's constitutional right; and, (4) that the policy is  
25 the moving force behind the constitutional violation." *Dougherty v. City of Covina*, 654 F.3d 892,  
26 900 (9th Cir. 2011). Here, Defendant argues that Plaintiff failed to plead factual allegations in  
27 support of the second element – that the municipality had a policy. (ECF No. 47 at 3 ("Plaintiff  
28 fails to state a cognizable *Monell* claim against LVMPD because his claim has no factual content

1 from which the Court may draw a reasonable inference that LVMPD is liable for an  
2 unconstitutional policy.”.)

3 “Plaintiffs need not meet any heightened pleading standard to assert a § 1983 claim.” *J.M.*  
4 *by & Through Rodriguez v. Cty. of Stanislaus*, 2018 WL 5879725, at \*4 (E.D. Cal. Nov. 7, 2018).  
5 And although the Court must presume all factual allegations in Plaintiff’s complaint are true, the  
6 Court does not “have to accept every allegation in the complaint as true in considering its  
7 sufficiency; rather, . . . [we] will examine whether conclusory allegations follow from the  
8 description of facts as alleged by the plaintiff.” *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th  
9 Cir. 1992). To the extent that conclusory allegations do not follow from the facts alleged, the  
10 Court will reject these conclusions and find that the Plaintiff failed to state a claim. *Id.*

### 11 C. Analysis

12 As explained in more detail below, the Court finds that Plaintiff failed to include sufficient  
13 facts in his proposed Second Amended Complaint to make out *Monell* claims. However, based on  
14 Plaintiff’s reply brief, the Court believes that Plaintiff may be able to plead sufficient facts to  
15 make out *Monell* claims. Accordingly, the Court will deny Plaintiff’s Motion to Amend (ECF No.  
16 44) without prejudice.

17 In Count II of Plaintiff’s proposed Second Amended Complaint, Plaintiff alleges that after  
18 officers beat him, dislocated his shoulder, and broke his arm, several officers “kept the plaintiff  
19 handcuffed behind his back.” (ECF No. 44-1 at 8.) He goes on to allege that “[j]unior officers did  
20 the cuffing, supervising officers allowed it, and LVMPD must have a policy then for keeping  
21 detainees in severe pain even though he is completely surrounded and he could be handcuffed in  
22 front, or shackled.” (*Id.*) Although Plaintiff provides additional factual allegations about his  
23 encounter with officers, he does not provide any additional factual allegations regarding any  
24 alleged policy. The Court gathers from Plaintiff’s reply brief that he believes LVMPD has an  
25 official policy or custom of keeping detainees in pain based on his experience with several  
26 officers allegedly being complicit in this conduct toward him. (ECF No. 59 at 4-5.) However,  
27 Plaintiff’s allegations in his reply brief cannot be “read into” his proposed complaint. And even if  
28 they could, they do not provide sufficient factual allegations to support the conclusion that

1 LVMPD has a policy or custom of keeping detainees in severe pain. Accordingly, the Court will  
2 deny Plaintiff's motion to amend Count II.

3 In Count III of Plaintiff's proposed Second Amended Complaint, Plaintiff alleges that  
4 "CCDC/Clark County/LVMPD has a custom, policy, and a known history of using this bench  
5 even though it is below the dignity of a man, and further LVMPD sett[l]ed suit for this exact same  
6 civil rights violation . . . ." (ECF No. 44-1 at 9.) Plaintiff also alleges that "CCDC/LVMPD has a  
7 policy of using this bench as a punishment//torture device, and has in the past settled litigation  
8 dealing with this very same issue." (*Id.* at 5.) Plaintiff does not include any additional facts in his  
9 proposed complaint about this alleged policy or facts to support the conclusion that such a policy  
10 exists. However, in his reply in support of his motion to amend, Plaintiff alleges that while he was  
11 handcuffed to the bench, at least four other people were all handcuffed to the same bench. He also  
12 cites *Cooley v. Marshal*, a case in which an inmate at CCDC sued (and won) over being  
13 handcuffed to a bench for at least 15 hours. 2015 WL 4622589, at \*3-4 (D. Nev. July 31,  
14 2015), *aff'd in part, rev'd in part and remanded sub nom. Cooley v. Meads*, 728 F. App'x 773  
15 (9th Cir. 2018) (reversed only on district court's refusal to give punitive damages instruction to  
16 jury). Plaintiff notes that in *Cooley*, Judge Du specifically noted that "the court is concerned about  
17 the constitutionality of the Detention Center's practice of restraining detainees to a bench as a  
18 solution to the shortage of isolation cells," but did not address the constitutionality of this policy  
19 as plaintiff "ha[d] not asserted a claim under *Monell*." *Id.* at \*3 n. 3. Plaintiff writes that he is  
20 attempting to advance a *Monell* claim over this same policy. (ECF No. 59 at 6.)

21 The Court finds that in Plaintiff's proposed Second Amended Complaint, he has not  
22 alleged sufficient facts to support the conclusion that Clark County or LVMPD has a policy of  
23 handcuffing detainees to a bench for extended periods. Again, Plaintiff's allegations in his reply  
24 brief cannot be "read into" his proposed complaint, but based on these allegations, the Court does  
25 not believe that all future attempts at amendment would be futile. Accordingly, the Court will  
26 deny Plaintiff's motion to amend Count III.

27 In Count V of Plaintiff's proposed Second Amended Complaint, Plaintiff alleges that  
28 "CCDC/LVMPD and Clark [C]ounty have a policy of enforcing no medical devices in General

1 Population . . . .” (ECF No. 44-1 at 11.) Plaintiff provides no other factual allegations in his  
2 proposed complaint to support his allegation that such a policy existed. However, in his reply  
3 brief, he alleges new facts to support his contention that such a policy exists: (1) in his twenty  
4 months at CCDC, he never saw another inmate with a medical device and (2) Officer Cesar  
5 Esparza told him that CCDC does not allow medical devices outside of the medical unit. Based  
6 on the foregoing, the Court finds that in Plaintiff’s proposed Second Amended Complaint, he has  
7 not alleged sufficient facts to support the conclusion that such a policy existed. Plaintiff’s  
8 allegations in his reply brief cannot be “read into” his proposed complaint, but based on these  
9 allegations, the Court does not believe that all future attempts at amendment would necessarily be  
10 futile. Accordingly, the Court will deny Plaintiff’s motion to amend Count V.

11 If Plaintiff chooses to attempt to amend its complaint again, it must file another motion to  
12 amend and attached a proposed Second Amended Complaint. Plaintiff is advised that the  
13 proposed Second Amended Complaint must contain all of Plaintiff’s allegations and claims; the  
14 Court cannot refer to prior complaints, motions, briefs, or any other filings to make Plaintiff’s  
15 proposed Second Amended Complaint complete. In other words, the proposed Second Amended  
16 Complaint must be complete in and of itself.

17 **III. Plaintiff’s Motions to Name New Defendants and Serve Them (ECF Nos. 67, 75,  
18 76, and 82)**

19 Plaintiff filed a motion to serve unserved defendants on April 30, 2019. (ECF No. 67.)  
20 Defendants did not respond to this motion.

21 The Court previously directed the Clerk of Court to issue summons to Dr. Duran and to  
22 deliver the same to the U.S. Marshal Service (“USM”) for service. (*See* ECF Nos. 18, 19.)  
23 Plaintiff properly submitted the USM-285 forms for defendant Dr. Duran; however, the USM was  
24 unable to complete service for this defendant. (*See* ECF No. 22.) In ECF No. 67, Plaintiff  
25 provides what he believes are valid addresses for Dr. Duran and renews his request that USM  
26 serve Dr. Duran.

27 In ECF Nos. 75 and 76, Plaintiff provides the names of the five sergeants who worked in  
28 the booking area of CCDC while Plaintiff was allegedly handcuffed to a bench for approximately



1 24 hours. He asks the Court to substitute John Does 1-3 with the names of these five sergeants  
2 (Sgt. Robert Burleson, P#8115; Sgt. Neldon Barrowes P#5906; Sgt. Linda Buchanan P#9904;  
3 Sgt. Kevin Kegley P#8836; and Sgt. Jeanette Dillon P#8351) and have the USM serve them.

4 The Court will grant these three motions (ECF Nos. 67, 75, and 76) as unopposed. *See* LR  
5 7-2(d) (“The failure of an opposing party to file points and authorities in response to any motion,  
6 except a motion under Fed. R. Civ. P. 56 or a motion for attorney’s fees, constitutes a consent to  
7 the granting of the motion.”).<sup>3</sup> The Court will order the Clerk of Court to send Plaintiff blank  
8 summonses and USM-285 forms, along with a copy of this order. Plaintiff must fill out these  
9 forms and file them with the Court by January 6, 2020. Plaintiff is instructed that, for each  
10 sergeant he wishes to serve, he must include the individual’s “P#,” first name, and last name on  
11 the summonses and USM-285 form. (*See* ECF No. 38 at 2 (indicating certain individuals could  
12 not be served without “P#s” or first names).) Upon receipt of the proposed summonses and  
13 completed USM-285 forms from Plaintiff, the Clerk of Court must issue the summonses and  
14 deliver the summonses, the USM-285 forms, a copy of the First Amended Complaint, and a copy  
15 of this order to the U.S. Marshal for service.

16 Finally, Plaintiff filed a similar motion to substitute new parties on July 26, 2019. (ECF  
17 No. 82.) Defendants responded on August 8, 2019. (ECF No. 85.) Plaintiff did not reply.

18 In Plaintiff’s motion, he seeks to substitute two Doe defendants for defendants he has now  
19 identified. Specifically, he previously insufficiently identified “Nurse Pat” as a defendant, but  
20 now understands Nurse Pat’s full name to be Patricia Oliver. Similarly, he previously  
21 insufficiently identified “Nurse G” and now understands Nurse G’s full name to be Dionna Greer.  
22 Plaintiff requests that these defendants be substituted for Doe defendants and that the USM serve  
23 them. Plaintiff also moves the Court to order NaphCare to identify everyone who signed any  
24 medical document at CCDC for Plaintiff.

---

25  
26  
27 <sup>3</sup> The Court also previously indicated to Plaintiff that he may attempt service again on Dr. Duran and that  
28 he could move the Court to substitute the true names of the Doe defendants if the identities of these  
individuals came to light during discovery. (ECF No. 38 at 4-5.) This appears to have occurred.

1 Defendants respond that they have no objection to Plaintiff substituting Doe defendants  
2 for these two individuals, but state that these individuals no longer work at NaphCare and  
3 Defendants cannot accept service for them. Defendant also opposes Plaintiff's request to force  
4 NaphCare to identify all persons who signed any medical document for Plaintiff while he was at  
5 CCDC. Defendants represent that Plaintiff has not served them with any discovery requesting  
6 these identities.

7 Regarding Plaintiff's request to substitute Patricia Oliver and Dionna Greer for Doe  
8 defendants, Plaintiff has not indicated that he has a valid address at which either individual can be  
9 served. Defendants indicate that neither continues to work at NaphCare and that Defendants  
10 cannot accept service for either. Accordingly, the Court will deny Plaintiff's request to substitute  
11 these individuals for Doe defendants and have the USM serve them without prejudice. If Plaintiff  
12 discovers valid addresses for either or both individuals in the future, he may move the court again  
13 to substitute them for Doe defendants and have the USM serve them.

14 Regarding Plaintiff's request that Defendants identify every person who signed a medical  
15 document at CCDC for Plaintiff, there is no evidence before the Court that Plaintiff properly  
16 requested this information through discovery. It also appears that Plaintiff did not meet and confer  
17 with Defendants regarding his request for this information. As such, the Court will deny  
18 Plaintiff's request and, therefore, ECF No. 82 in its entirety. Plaintiff is advised to review the  
19 Federal Rules of Civil Procedure and Local Rules regarding the proper ways in which parties can  
20 obtain discovery, as well as Local Rule IA 1-3(f)(1) regarding meet and confers.

#### 21 **IV. Plaintiff's Motion for Appointment of Counsel (ECF No. 53)**

22 Plaintiff filed a motion for appointment of counsel on April 8, 2019. (ECF No. 53.)  
23 Certain defendants responded on April 11, 2019 (ECF No. 56), while other defendants moved to  
24 join this response the same day (ECF No. 57). Plaintiff replied on April 25, 2019. (ECF No. 65.)  
25 Plaintiff then filed a notice reaffirming his request for appointment of counsel. (ECF No. 100.)  
26 Certain defendants treated this filing as a third motion for appointment of counsel and responded  
27 on October 14, 2019 (ECF No. 103), while other defendants joined this filing on October 21,  
28 2019. (ECF No. 105.) Plaintiff replied on October 24, 2019. (ECF No. 107.)

1 Plaintiff requests a court-appointed attorney for several reasons. He asserts that he cannot  
2 afford counsel; the issues in this case are complex; defendants are far away, which makes  
3 discovery and communication difficult; there are “medical components” requiring “technical  
4 knowledge” that Plaintiff does not have; there are many defendants in the case and lots of  
5 documents plaintiff is responsible for providing; Plaintiff has limited knowledge of the law;  
6 Plaintiff has been unsuccessful in retaining his own counsel; the case is ripe for settlement;  
7 Plaintiff has been unsuccessful in obtaining some discovery from defendants; and the case  
8 involves a “serious medical injury.”

9 Defendants oppose Plaintiff’s motion and argue that he has not presented any  
10 extraordinary circumstances that would make appointment of counsel appropriate. Further,  
11 Defendants note that this Court had already denied Plaintiff’s previous motion for appointment of  
12 counsel and that the circumstances have not changed since this Court entered that order.

13 In reply, Plaintiff argues that there have been some changes since the Court first denied  
14 his motion for appointment of counsel. Importantly, Plaintiff notes that he is having surgery on  
15 his right arm shortly (related to the injuries that caused this litigation), is right-handed, and  
16 afterwards, he will be unable to write or type to continue with this litigation for several months.  
17 This is so, in part, because he will need to wear an arm immobilizer for several months after  
18 surgery.

19 Civil litigants do not have a Sixth Amendment right to appointed counsel. *Storseth v.*  
20 *Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). However, in very limited circumstances, federal  
21 courts are empowered to request an attorney to represent an indigent civil litigant. For example,  
22 courts have discretion, under 28 U.S.C. § 1915(e)(1), to “request” that an attorney represent  
23 indigent civil litigants upon a showing of “exceptional circumstances.” *Agyeman v. Corrections*  
24 *Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004). The circumstances in which a court will make  
25 such a request, however, are exceedingly rare and require a finding of extraordinary  
26 circumstances. *United States v. 30.64 Acres of Land*, 795 F.2d 796, 799-800 (9th Cir. 1986);  
27 *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986).

1 To determine whether the “exceptional circumstances” necessary for appointment of  
2 counsel are present, the Court evaluates (1) the likelihood of plaintiff’s success on the merits and  
3 (2) the plaintiff’s ability to articulate his claim pro se “in light of the complexity of the legal  
4 issues involved.” *Agyeman*, 390 F.3d at 1103 (quoting *Wilborn*, 789 F.2d at 1331). Neither of  
5 these factors is dispositive and both must be viewed together. *Wilborn*, 789 F.2d at 1331. It is  
6 within the Court’s discretion whether to request that an attorney represent an indigent civil  
7 litigant under 28 U.S.C. § 1915(e)(1). *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009).

8 The Court has carefully reviewed Plaintiff’s allegations and request for appointment of  
9 counsel. Regarding Plaintiff’s likelihood of success on the merits, the Court notes that Plaintiff  
10 has asserted five plausible claims. He has also attached some medical documentation to filings  
11 that provides some support for these claims. Accordingly, he has some likelihood of success on  
12 the merits. Regarding Plaintiff’s ability to articulate his claims, he alleges that he will undergo  
13 surgery soon on his right arm, that he is right-handed, and that after surgery, he will have to wear  
14 an arm immobilizer for several months. As a result, Plaintiff will not be able to write or type to  
15 continue this litigation for months. Considering these facts, the Court finds that this case presents  
16 a unique set of circumstances where the very allegations at the heart of Plaintiff’s complaint, his  
17 arm condition, will prevent him from pursuing his case. Therefore, the Court, in its discretion,  
18 finds that Plaintiff demonstrates the exceptional circumstances required for the appointment of an  
19 attorney and will grant his motion (ECF No. 53).

20 The Court will refer this case to the Court’s Pro Bono Pilot Program to attempt to find an  
21 attorney to accept Plaintiff’s case. Plaintiff should be aware that the federal court has no authority  
22 to require attorneys to represent indigent litigants in civil cases under 28 U.S.C. § 1915(d).  
23 *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 298 (1989). Rather, when a  
24 court “appoints” an attorney, it can only do so if the attorney voluntarily accepts the assignment.  
25 *Id.* If counsel is found for Plaintiff, the Court will issue an order appointing counsel and counsel  
26 will contact Plaintiff. Plaintiff is reminded that until counsel is provided, he is still responsible for  
27 complying with all deadlines in his case.  
28

1                   **V.      Plaintiff's Motion to File Discovery Exhibits or, Alternatively, Motion for**  
2                   **Settlement Conference (ECF No. 69)**

3                   Plaintiff filed a motion seeking to file discovery exhibits on the record or, alternatively,  
4                   seeking a settlement conference on May 9, 2019. (ECF No. 69.) Defendants responded on May  
5                   23, 2019. (ECF No. 71.) Plaintiff did not file a reply.

6                   First, the Court denies Plaintiff's request to file discovery exhibits on the record. Local  
7                   Rule 26-8 provides that written discovery "must not be filed with the court" unless the Court  
8                   orders otherwise. Plaintiff has not provided any reason why it would be necessary or appropriate  
9                   to file discovery in the record in this case. Accordingly, the Court denies this request of  
10                  Plaintiff's.

11                 Second, the Court encourages parties to engage in settlement discussions and to attempt to  
12                 settle cases early, if possible. Here, however, Defendants do not believe that a settlement  
13                 conference would be productive or an efficient use of the Court's time at this stage in discovery.  
14                 The Court will not force Defendants to engage in a settlement conference at this juncture and will  
15                 deny Plaintiff's request for a settlement conference. Accordingly, ECF No. 69 will be denied in  
16                 its entirety.

17                 In the future, however, the parties may file a joint stipulation requesting a settlement  
18                 conference if they agree that Magistrate Judge Weksler's participation in discussions would be  
19                 helpful.

20                   **VI.      Defendants' Motion to Extend Time (ECF Nos. 70 and 91)**

21                 Defendants filed their first request to extend discovery by 90 days on May 21, 2019. (ECF  
22                 No. 70.) Other defendants joined this motion on May 24, 2019 (ECF No. 72), and Plaintiff  
23                 responded on June 3, 2019. (ECF No. 73.) Defendants replied on June 6, 2019. (ECF No. 74.)  
24                 Plaintiff subsequently filed a motion to deny Defendants' motion to extend time on August 23,  
25                 2019. (ECF No. 91.) Defendants did not respond to this motion.

26                 The Court carefully reviewed all of the parties' briefs. While Plaintiff opposes  
27                 Defendants' proposed discovery extension, as Defendants point out, Plaintiff also concedes that  
28                 he has not completed discovery yet. Defendants argue that they need additional time, too. Further,

1 given some of the decisions in this order and the fact that some of the extend-discovery deadlines  
2 that Defendants proposed have already lapsed, the Court believes that both parties will need  
3 additional time to conduct and complete discovery. Accordingly, the Court will grant Defendants'  
4 motion for an extension (ECF No. 70) starting from the date of this order.<sup>4</sup> The new dates are as  
5 follows: Discovery Deadline 5/30/2020; Motions to Amend Pleadings and Add Parties 3/1/2020;  
6 Expert Disclosures 3/31/2020; Rebuttal Expert Disclosures 4/30/2020; Dispositive Motions  
7 6/29/2020; Pretrial Order 7/29/2020; and Interim Status Reports 3/31/2020.

8 For the same reasons that the Court grants Defendants' motion for an extension of time, it  
9 denies Plaintiff's motion to deny Defendants' motion (ECF No. 91).

#### 10 **VII. Plaintiff's Motion Seeking Status of Pending Motions (ECF No. 94)**

11 Plaintiff filed a motion on September 9, 2019 seeking to know the status of the motions  
12 pending before this Court. (ECF No. 94.) Defendants did not respond to this motion. In light of  
13 this order, which addresses all of the motions pending before the undersigned Magistrate Judge,  
14 Plaintiff's Motion Seeking Status of Pending Motions (ECF No. 94) is denied as moot.

#### 15 **VIII. CONCLUSION**

16 **IT IS THEREFORE ORDERED** that Plaintiff's Motion to Amend First Amended  
17 Complaint (ECF No. 44) is DENIED without prejudice.

18 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Strike Response to Motion to  
19 Amend (ECF No. 58) is DENIED.

20 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Appointment of Counsel (ECF  
21 No. 53) is GRANTED.

22 **IT IS FURTHER ORDERED** that this case is referred to the Pilot Pro Bono Program  
23 adopted in General Order 2017-07 for the purpose of identifying an attorney willing to be  
24 appointed as a pro bono attorney for Plaintiff. Plaintiff is reminded that he must comply with all  
25

---

26 <sup>4</sup> At the time that Defendants filed their motion, they sought a 90-day extension of all discovery  
27 dates and had two months remaining before the discovery cut-off date (i.e. they indicated they needed five  
28 months to complete discovery). Accordingly, the court is granting the parties a little more than five months  
to complete discovery.

1 deadlines currently set in his case and there is no guarantee that counsel will be appointed. If  
2 counsel is found, an order appointing counsel will be issued by the Court and Plaintiff will be  
3 contacted by counsel.

4 **IT IS FURTHER ORDERED** that the Clerk of Court must forward this order to the Pro  
5 Bono Liaison.

6 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Service on Unserved  
7 Defendants (ECF No. 67) is GRANTED.

8 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Substitute John Doe #1 for True  
9 Identities; and Request an Order to Serve Newly Named Defendants (ECF No. 75) is GRANTED.

10 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Substitute John Doe #1 for True  
11 Identities; and Request an Order to Serve Newly Named Defendants (ECF No. 76) is GRANTED.

12 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Substitute Parties (ECF No. 82)  
13 is DENIED without prejudice.

14 **IT IS FURTHER ORDERED** that the Clerk of Court must send Plaintiff six blank  
15 summonses and six blank USM-285 forms, along with a copy of this order.

16 **IT IS FURTHER ORDERED** that Plaintiff must fill out these forms and file them with  
17 the Court **by January 3, 2020**.

18 **IT IS FURTHER ORDERED** that upon receipt of the proposed summonses and  
19 completed USM-285 forms from Plaintiff, the Clerk of Court must issue the summonses and  
20 deliver the summonses, the USM-285 forms, a copy of the First Amended Complaint, and a copy  
21 of this order to the U.S. Marshal for service.

22 **IT IS FURTHER ORDERED** that Plaintiff's Motion to File Discovery Exhibits, or  
23 Alternatively, Motion for Settlement Conference (ECF No. 69) is DENIED.

24 **IT IS FURTHER ORDERED** that Defendants' motion for an extension (ECF No. 70) is  
25 GRANTED. The discovery deadlines are as follows: Discovery Deadline 5/30/2020; Motions to  
26 Amend Pleadings and Add Parties 3/1/2020; Expert Disclosures 3/31/2020; Rebuttal Expert  
27 Disclosures 4/30/2020; Dispositive Motions 6/29/2020; Pretrial Order 7/29/2020; and Interim  
28 Status Reports 3/31/2020.

1           **IT IS FURTHER ORDERED** that Plaintiff's Motion to Deny Motion to Extend Time  
2 for Discovery (ECF No. 91) is DENIED.

3           **IT IS FURTHER ORDERED** that Plaintiff's Motion Seeking Status of Pending Motions  
4 (ECF No. 94) is DENIED.

5           DATED: December 2, 2019

6  
7   
8 BREND A WEKSLER  
9 UNITED STATES MAGISTRATE JUDGE  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28